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No. 7302

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANG NAM,

Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

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APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant's answer to the petition for a rehearing herein, respectfully shows:

I.

Appellee's petition for a rehearing is prefaced with the assertion, made for the first time, that the appeal was not timely taken, and that therefore this court is without jurisdiction to entertain it. In support of the point reference is made by appellee to a rule of the

District Court of the United for the Territory of Hawaii. There are two answers to the point:

1. The rule relied upon is not incorporated in the record and the court cannot take judicial notice of its existence.

2. Even if the court could take judicial notice of the existence of the rule, a breach thereof would not affect jurisdiction.

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1. THE RULE RELIED UPON IS NOT INCORPORATED IN THE RECORD AND THE COURT CANNOT TAKE JUDICIAL NOTICE OF ITS EXISTENCE.

There is no record before the court incorporating the rule of the court below, and obviously statements contained in a petition for rehearing cannot operate as a substitute for a record. Under settled law a reviewing court will not take judicial notice of the rules of inferior courts. (*Gammon v. Ealey & Thompson,* 97 Cal. App. 452, 456, 457; *Sweeney v. Stanford,* 60 Cal. 363; 15 R. C. L. 1079.)

The court below clearly had jurisdiction to grant an appeal in habeas corpus proceedings, and the controlling presumption on appeal is that it acted within its jurisdiction. Appellee has not furnished a record or cited any statute which dispels that presumption, and the court cannot take judicial notice of the existence of a rule such as appellee asserts. It therefore follows that appellee's point respecting jurisdiction must fall for lack of foundation.

2. EVEN IF THE COURT COULD TAKE JUDICIAL NOTICE OF THE EXISTENCE OF THE RULE, A BREACH THEREOF WOULD NOT AFFECT JURISDICTION.

Appellee deems the decision of this court in *Bryan v. Fumio Arai*, 64 F. (2d) 954, as decisive on the question of jurisdiction, but the adequacy of the record to present the question was not therein discussed.

The effect to be given rules of court is a disputatious question on which the authorities in general are widely divergent in their conclusions. There is no divergence, however, in the decisions of the Supreme Court of the United States and its pronouncements are uniformly to the effect that the court which makes a rule may suspend its operation in a particular case (*United States v. Breitling*, 20 How. 252, 254), that rules limiting time are mere regulations of practice not affecting jurisdiction (*Abbott v. Brown*, 241 U. S. 606), and that no rule of court can enlarge or restrict jurisdiction (*Washington-Southern Nav. Co. v. Baltimore P. S. Co.*, 263 U. S. 629, 635, 636).

If the principles of law declared in the foregoing cases be applied to the present appeal, then it is plain that appellee's point respecting jurisdiction is wholly without merit.

II.

An extended answer to appellee's points on the merits would simply burden the court with a duplication of the arguments made in the briefs filed before submission of the case. The decision herein merely reflects an adherence to decisions previously rendered by this court and their application to the present case.

Appellee seeks to have the court change its opinion by directing its attention to debates in congress. If statements in a petition for rehearing as to what occurred during congressional debates is to be accepted as a substitute for a record, it is sufficient to say that "debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." (*United States v. Trans-Missouri Freight Ass'n,* 166 U. S. 290.)

It is therefore respectfully submitted that the petition for a rehearing should be denied.

Dated, San Francisco, California,
April 26, 1935.

E. J. Botts,
Attorney for Appellant.

Herbert Chamberlin,
Of Counsel.